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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELNY, an individual,

Plaintiff,

v.

**GAVIN NEWSOM, an individual, in his
official capacity; XAVIER BECERRA, an
individual, in his official capacity; CITY OF
MENLO PARK, a municipal corporation;
and DAVE BERTINI, in his official
capacity,**

Defendants.

Case No. 3:17-cv-07357 RS (NC)

**CALIFORNIA ACTING ATTORNEY
GENERAL MATTHEW RODRIQUEZ'S
SUPPLEMENTAL BRIEF REGARDING
RECENT AUTHORITIES**

Date: April 22, 2021
Time: 1:30 p.m.
Dept: Courtroom 3, 17th Floor
Judge: The Honorable Richard G.
Seeborg
Trial Date: None set
Action Filed: 12/28/2017

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California Acting Attorney General Matthew Rodriquez (sued as Xavier Becerra) submits this supplemental brief regarding “*United States v. Rundo*, 2021 WL 821938 (9th Cir. March 4, 2021), and *Young v. State of Hawaii*, [2021 WL 1114180] (9th Cir. March 24, 2021).” ECF 182.

I. *YOUNG V. STATE OF HAWAII*

In *Young*, the Ninth Circuit, sitting *en banc*, held that the State of Hawaii’s restrictions on the open carry of handguns did not violate the Second Amendment on their face, because the open carry of handguns is conduct that has not traditionally fallen within the protection of the Second Amendment. *See Young*, 2021 WL 1114180, at **3, 35, 44.

A. The Relevance of *Young* to the Attorney General’s Pending Motion

Young supports the Attorney General’s motion for summary judgment. Under the same “*Heller* step one” analysis employed by the court in *Young*, the Attorney General argued that Zeleny’s desire to carry an unloaded firearm for the purpose of “amplifying” his protests was not conduct protected by the Second Amendment at all. ECF 161 at 16-18; ECF 166 at 14-15. The Attorney General demonstrated that there was no evidence of a free-standing constitutional or historical right to openly carry unloaded firearms for the purpose of amplifying a protest. *Id.* California’s regulation of such unloaded firearms thus falls outside the scope of the Second Amendment, and such regulation can be upheld outright. *Id.*

Young is in accord: If carrying loaded handguns for self-defense outside the home is conduct that has not traditionally fallen within the protection of the Second Amendment—the core of which is self-defense of hearth and home—then carrying unloaded firearms for the purpose of amplifying a protest is even further outside the scope of the Second Amendment. Summary judgment should be entered in favor of the Attorney General on the complaint’s Second Amendment claims.

B. The Relevance of *Young* to Zeleny’s Pending Motion

Young also undermines Zeleny’s motion for summary judgment:

1. Waiver

First, Zeleny argues in his motion that he has a constitutional right to carry firearms outside the home for self-defense. ECF 163 at 1 (“California’s prohibitions eliminate a person’s right to

1 carry a firearm in self-defense outside the home, in violation of the Second Amendment.”) The
 2 Attorney General demonstrated that this argument was waived for failure to plead it in the
 3 operative complaint, which asserted only a Second Amendment right to use *unloaded* weapons
 4 for *protests*, not a right to carry loaded weapons for self-defense. ECF 166 at 15-17; ECF 161 at
 5 18-19. Zeleny’s motion for summary judgment can be denied on this basis alone. *Cf. Young*,
 6 2021 WL 1114180, at *8 (declining to address putative as-applied claim that was “buried in
 7 [Young’s] complaint and not well pleaded”).

8 **2. *Heller* Step One Analysis**

9 Second, even if Zeleny had pleaded a Second Amendment right to carry his firearms openly
 10 for purposes of self-defense (which he did not), *Young* forecloses such a claim.

11 Zeleny relies heavily on cases from the Seventh Circuit (*Moore v. Madigan*, 702 F.3d 933
 12 (7th Cir. 2012)) and D.C. Circuit (*Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017))
 13 which found that open carry was protected under the Second Amendment to some degree. ECF
 14 163 at 12; *see Young*, 2021 WL 1114180, at **11-12 (discussing post-*Heller* cases). In *Young*,
 15 the Ninth Circuit—whose opinion is binding here—reached a different result than *Moore* and
 16 *Wrenn*. *See, e.g., Young*, 2021 WL 1114180, at *40 (“We thus vigorously disagree with the D.C.
 17 Circuit’s conclusion that . . . ‘everyone started out with robust carrying rights.’”). After
 18 conducting an extensive historical analysis, the court in *Young* concluded that the historical
 19 record “confirms that we have never assumed that individuals have an unfettered right to carry
 20 arms into the public square for self-defense.” *Young*, 2021 WL 1114180, at *35. “Government
 21 regulations on open carry are laws restricting conduct that can be traced back to the founding era
 22 and are historically understood to fall outside of the Second Amendment’s scope, and thus may
 23 be upheld without further analysis.” *Young*, 2021 WL 1114180, at *35 (cleaned up). Therefore,
 24 the court held that, at a minimum, “the government may regulate, and even prohibit, in public
 25 places—including government buildings, churches, schools, and markets—the open carrying of
 26 small arms capable of being concealed, whether they are carried concealed or openly.” *Id.*

27 While the holding of *Young* was addressed to “small arms”—because the Hawaii statute at
 28 issue applied only to small arms—its reasoning applies to Zeleny’s complaint based on his desire

1 to carry long arms in public: “the fundamental point is that for centuries we have accepted that, in
 2 order to maintain the public peace, the government must have the power to determine whether
 3 and how arms may be carried in public places. There is no right to carry arms openly in public;
 4 nor is any such right within the scope of the Second Amendment.” *Young*, 2021 WL 1114180, at
 5 *40; *see id.* at **35 (“government has the power to regulate arms in the public square”), 40
 6 (“carrying arms in public was not treated as a fundamental right”). “The power of the
 7 government to regulate carrying arms in the public square does not infringe in any way on the
 8 right of an individual to defend his home or business,” which is the core of the Second
 9 Amendment right. *Id.* at *36.

10 While an individual’s liberty interest is at its zenith in the home, “it is particularly the duty
 11 of the states to defend the public square.” *Id.* Historically, states had the primary responsibility
 12 for “securing what was formerly known as the king’s peace.” *Id.* (citations omitted). Part of
 13 maintaining the “king’s peace” was preventing individuals like Zeleny—with his fatigues,
 14 machinegun, and ammunition—from terrorizing the residents and visitors to Menlo Park by “the
 15 mere presence of [his] weapons.” *Id.* While the Court need not to engage in further historical
 16 analysis because Zeleny has not raised a claim based on self-defense, even if he had, it is
 17 impossible to reconcile *Young*’s holding and reasoning with the putative constitutional right
 18 advanced by Zeleny to stand, for hours, on a road median in Menlo Park with guns, ammunition,
 19 and no way for the reasonable passerby to understand why firearms are present (as contrasted
 20 with the highly regulated movie shoots described by Zeleny’s expert witnesses). Indeed, Zeleny’s
 21 activity is the quintessential example of a situation in which “the mere presence of such weapons
 22 presents a terror to the public” that would “strongly suggest that state and local governments have
 23 lost control of our public areas.” *Id.* at 41. On the extreme facts of this case, California’s
 24 restrictions on open carry are indisputably “within the state’s legitimate police powers and are not
 25 within the scope of the right protected by the Second Amendment.” *Id.* at *44.

26 **3. *Heller* Step Two Analysis**

27 Third, even if Zeleny had pleaded a right to carry loaded firearms for purposes of self-
 28 defense, and even if *Young* did not foreclose Zeleny’s claims at step one of *Heller*, they would

1 still be foreclosed at step two of *Heller*, as the district courts in *Flanagan* and *Nichols*
 2 determined.¹ ECF 161 at 20-22; ECF 166 at 19. The court in *Young* affirmed the commonsense
 3 principle that, in public places, “the mere presence of weapons terroriz[es] the people.” *Young*,
 4 2021 WL 1114180, at *36; *id.* at *40 (“the mere presence of such weapons presents a terror to the
 5 public”). Armed individuals in public places can “alarm[] unsuspecting individuals” and can
 6 create dangerous situations that “can escalate quickly if the armed person makes the slightest
 7 wrong move.” *Flanagan*, 2018 WL 2138462, at *7. Hence, as the Attorney General
 8 demonstrated, California’s restrictions on open carry are justified by its need to protect public
 9 safety and prevent the diversion of law enforcement resources, and the means chosen are tailored
 10 to achieve those goals. ECF 161 at 20-22; ECF 166 at 19.

11 **II. UNITED STATES V. RUNDO**

12 In *Rundo*, the Ninth Circuit held that a federal criminal statute—the Anti-Riot Act (18
 13 U.S.C. §§ 2101, 2102)—was overbroad under the First Amendment, but preserved the statute by
 14 severing the offending portions. *See* 2021 WL 821938 (9th Cir. March 4, 2021). Because
 15 California’s restrictions on the open carry of firearms do not regulate speech, ECF 161, and
 16 because Zeleny has not brought an overbreadth challenge, it is not clear how *Rundo* applies here.

17 In his statement of recent decision, Zeleny suggested that *Rundo*’s discussion of the
 18 “heckler’s veto” might be relevant here. ECF 177; *Rundo*, 2021 WL 821938, at *7. “A heckler’s
 19 veto is an impermissible content-based speech restriction where the speaker is silenced due to an
 20 anticipated disorderly or violent reaction of the audience.” *Id.* (citations omitted). Here,
 21 California’s restrictions on the open carry of firearms do not restrict speech (either facially, or in
 22 Zeleny’s situation); and even if they did, the restrictions are not content-based: they do not target
 23 Zeleny because of what he might say, or what passersby’s reaction might be to his *speech*.
 24 California’s laws limit only the open carry of firearms in certain circumstances. The heckler’s
 25 veto has no relevance to Zeleny’s claims against the Attorney General.

26 ///

27 ¹ The *Flanagan* and *Nichols* appeals remain pending. Presumably the stays in both cases
 28 will be lifted now that the *en banc* court has issued the *Young* opinion. *See* 9th Cir. Nos. 18-
 55717 (*Flanagan*) & 14-55873 (*Nichols*).

Dated: April 9, 2021

Respectfully Submitted,

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/s/ John W. Killeen
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CERTIFICATE OF SERVICE

Case Name: **Zeleny, Michael v. Edmund G. Brown, et al.** No. **3:17-cv-07357 RS (NC)**

I hereby certify that on April 9, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**CALIFORNIA ACTING ATTORNEY GENERAL MATTHEW RODRIQUEZ'S
SUPPLEMENTAL BRIEF REGARDING RECENT AUTHORITIES**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 9, 2021, at Sacramento, California.

Lindsey Cannan
Declarant

/s/ *Lindsey Cannan*
Signature